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No. 97-1488

In The

Supreme Court of the United States

October Term, 1997

KENNETH M. ZERAN

Petitioner,

vs.

AMERICA ONLINE, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals misconstrue and misapply Section 230 of the Communications Decency Act to immunize America Online, Inc. from liability for its negligence and to apply the Act in such a way as to bar Petitioner's recovery for acts which significantly predated the adoption of the Act?

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Other Materials:

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Ballon, *Defamation and Preemption Under the Telecommunications Act of 1996: Why The Fourth Circuit's Ruling in Zeran v. America Online, Inc. is Wrong,* Journal of Internet Law, March 1998 6-13. 5

Rehnquist, *Oral Advocacy: A Disappearing Act,* 35 Mercer L. Rev. 1015 (1984) 1

Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet* 61 Albany L.Rev. 147 (1997) 4

Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.11- 4.17 (7th ed. 1993) 1

Petitioner Kenneth M. Zeran ("ZERAN") respectfully submits his reply to the Opposition of America Online, Inc. ("AOL") to the Petition for a Writ of Certiorari filed by ZERAN. ("AOL Opp."). Primarily, AOL argues that this case is not worthy of review by the Court because of the very nature of its precedent-setting, landmark status (AOL Opp. 7-9) and because the retroactive application of § 230 of the Communications Decency Act (47 U.S.C. § 230, "CDA") is not of national importance. (AOL Opp.17-19). Additionally, AOL asserts at length that the court below correctly decided the case. (AOL Opp. 9-17, 19-23).

I. This Case is Worthy of Certiorari

Since the exercise of the Court's certiorari is admittedly not subject to a mechanical formula and involves an often complex and variable set of recognized factors[1], ZERAN submits that, when considered on the whole and contrary to AOL's opposition, this case is appropriate for the Court's review by certiorari. These factors include:

A. The Effects of the CDA on Petitioner's Claims

1. The Courts Below Misconstrued the CDA

While the Court does not routinely grant certiorari solely because the courts below committed error[2], AOL asserts as a ground for denial of certiorari that the decisions below were correct.

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[1] These factors are outlined in Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.11-4.17 (7th ed. 1993) ("Supreme Court Practice") and in publications of many of the Court's former and present Justices. e.g. Rehnquist, *Oral Advocacy: A Disappearing Act*, 35 Mercer L. Rev. 1015 (1984).

[2] Supreme Court Practice, supra, § 4.17.

In advancing this argument, AOL has reproduced the fundamental flaw in the decisions below- that because the CDA does not include or define "distributor", congressional intent must be deduced from reference to the common law of defamation for § 230 (c) and from generalized statements of congressional intent for § 230(d) (3). (AOL Opp. 10-13).

First, this ignores the language of the CDA itself which contains the terms "publisher or speaker" and pointedly omits "distributor". The court should not have supplied language (equating publisher and distributor) Congress chose to omit.

Second, the opinion elevates the generalized statements of congressional findings and intent (§§ 230(a) and (b), (AOL Opp.12-13) over the specific title of § (c) "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material". Congress adopted §§(c) (l) and (2) for a specific purpose- to encourage action by an interactive computer service[3] to police its service without fear of publisher or speaker liability. Instead, the opinion rewards **inaction** in blocking and screening offensive material by a distributor. In fact- each of AOL's arguments defeat the undisputed purpose of 230(c).

Third, the opinion pointedly ignores expressions of specific congressional intent with regard to §§ 230(c) and (d) (3), both in the legislative history[4] and comments on the

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[3] As it relates to this appeal, AOL is a private, proprietary, member-only on-line service provider ("OSP") where members provide name, address, phone number, and credit card number and agree to a specified code of online conduct ("Terms of Service" and "Rules of the Road"), the violation of which subject the member to termination.

[4] The Conference Report on Section 230 stated:

floor of Congress by its authors[5] and the context of *Stratton-Oakmont Inc. v. Prodigy Service Co., Inc.*, 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995) (publisher liability imposed because of policing efforts) and *Cubby, Inc. v. CompuServe, Inc. et al.*, 776 F.Supp. 135 (S.D-N.Y. 1991) (OSP distributor must be placed on notice of the contents of a publication before liability can be imposed for electronic distribution of publication). Congress could easily have cited *Cubby, Inc.* in the Conference Report and the authors could have invoked *Cubby, Inc.* in debate as an example of impediments to achieving the purposes of § 230(c), but did neither. The court should not have repealed *Cubby, Inc.* when Congress chose not to do so.

Finally, the court should not have extended § 230(d)(3) to preempt state-based tort liability under the generalized statements of congressional intent without more definitive language, especially when Congress specifically chose to allow the continuation of distributor liability. Maintenance

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> One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users **as publishers or speakers of content** that is not their own **because they have restricted access to objectionable material**. (Emphasis added.)

H.R. Conf. Rep. No. 104-458, at 194 (1996)

[5] In a floor colloquy between the House authors, Congressman Cox stated:

> Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability if they police their systems . . . The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. 141 Cong. Rec. H. 8460, 8471 (August 5, 1995).

of ZERAN's distributor claims was not inconsistent with § 230 (c) and the court erred in holding that it was barred.

2. This Case Squarely Presents an Important Issue of Federal Law with Significant Practical Consequences.

Paradoxically, on one hand AOL characterizes this case as not deserving of certiorari because it does not create a split in the courts (AOL Opp. 7- 8), and on the other, counsels the court to await further study in the lower courts. (AOL Op. ft. 7). Of course, after this due study, should a court refuse to follow the Fourth Circuit opinion, AOL will undoubtedly be back before this Court seeking certiorari, extolling the public importance of resolving the reach of the CDA.

Rather than being a basis for denying certiorari, the landmark status of this case presents an important question of first impression, a ground for granting certiorari the Court has acknowledged countless times. Moreover, as demonstrated by AOL's citation of trailing cases (AOL Opp. 8-9) that have uniformly relied on the lower court decisions in this case[6], the reach of the CDA presented in this appeal will undoubtedly spawn recurring litigation.[7]

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[6] e.g. In *Blumenthal v. Drudge,* 1998 WL 195979 (D.D.C April 22, 1998), the court found "The court in Zeran has provided a complete answer to plaintiffs' primary argument, an answer grounded in the statutory language and intent of Section 230."

[7] The in press article cited by Petitioner (Pet. 19) has now been published, Ballon, *Defamation and Preemption Under the Telecommunications Act of 1996: Why The Fourth Circuit's Ruling in Zeran v. America Online, Inc. is Wrong,* Journal of Internet Law, March 1998, 6-13.

Also, in addition to the obvious effect the decisions below are having on burgeoning OSP litigation, the impact of this case transcends the fate of ZERAN- it potentially reaches into the lives of millions of Americans and renders them vulnerable to computer-based crime without a remedy.[8] And as the presence of computers grow more ubiquitous in our everyday life, the fallout of the lower court opinions will be magnified.

The Court has an opportunity to revitalize Congress' expressed standards of conduct for the coming millennium. The Court should not await "percolation" in the courts below of an erroneous construction of a federal statute which would bar access to both state and federal courts for persons injured as a result of the negligence of proprietary, private OSP's like AOL. Rather, it should decide this important, unsettled question of federal statutory law of broad public interest and safety.

3. This Case Has No Other Impediments to the Grant of Certiorari.

None of the traditional bases for denial of certiorari exist-the decision is not grounded on unique facts and there are no seriously disputed facts[9]; the case comes to the Court

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[8] In *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet,* 61 Albany L. Rev. 147 (1997), the author asserts that imposing liability on the provider is likely the only way to protect a defamed plaintiff, observing:

> This is particularly applicable to Zeran. AOL after all controlled its own servers, and Zeran had no ability to remove the defamatory messages himself. Furthermore, since neither Zeran nor AOL could identify the person who posted the messages, Zeran could neither motivate that person to remove them nor sue him for damages. Id. at 173.

from a grant of judgment on the pleadings, a well-worn path to the Court; there are no procedural defects or any likelihood that the dispute might be rendered moot or that the Court might decide another case in the interim which would justify a granted, vacated and remand treatment. In short, the case has none of the shortcomings which, can result in a denial of certiorari.

B. The Retroactivity of the CDA

1. The Circuit Court's Retroactive Application of the CDA to ZERAN's Claim Conflicts with the Court's Latest Retroactivity Cases.

AOL asserts that the Circuit Court's opinion is consistent with *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, ___ U.S. -, 117 S.Ct. 1871. (AOL Opp. 19-23). In essence, AOL would characterize the denial of any remedy to ZERAN for injuries suffered prior to the enactment of the CDA arising from completed conduct which occurred (and all elements of liability had ripened) long prior to the CDA as not being "unfair" under *Landgraf*. (AOL Opp. 21).[10] Of course, were AOL to be deprived of a

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[9] However, AOL repeats the mistake committed by the Circuit Court that "Shortly after being contacted by Zeran, AOL deleted the messages." (AOL Opp.2). To the contrary, the Complaint does not allege that AOL deleted the posting, but only that on April 28, 1995, ZERAN was told by an AOL service representative that it would be deleted (¶ 16, Complaint) and that he received the same promise on May 2, 1995. (¶ 28).

[10] AOL acknowledges that the "presumption against retroactivity is designed to avoid the unfairness of changing the legal rules when a person has engaged in conduct with an expectation of the probable legal consequences", but asserts that ZERAN failed to sufficiently establish his reliance. (AOL Opp. 22). However, it is undisputed that both AOL and ZERAN considered AOL a distributor, not a publisher, and entitled to notice. AOL's reliance upon the settled state of law pre-CDA was also

defense to such liability, it would immediately urge that it was "unfair" to "attach new consequences to a completed act". *Landgraf*, 114 S.Ct. at 1501.

AOL also claims that a statute eliminating jurisdiction can be applied to pre-enactment events, so as to "deny a litigant a forum for his claim entirely", citing Justice Scalia concurring in *Landgraf*. (AOL Opp. 23). However, the Court recently held in *Hughes Aircraft Co.* that jurisdictional statutes effect only where a suit may be brought not whether it may be brought at all. 117 S.Ct. at 1878. Nothing in the majority opinion in *Landgraf* or *Hughes Aircraft Co.* would allow the CDA to be exempt from the general presumption against retroactivity so as to deprive ZERAN of any forum in which to bring his claims.

The retroactive application of the CDA, especially when Congress knows exactly how to retroactively apply litigation barriers and chose not to do so in the CDA, creates not only "potential" unfairness, but concrete, actual unfairness to Zeran and others similarly harmed.

The Court should grant certiorari on the retroactivity issue because the opinion below conflicts with this Court's retroactivity jurisprudence.

CONCLUSION

Because this appeal presents important issues of federal law with significant practical consequences, manifestly represents the first of many recurring cases, presents profound questions for our country's expanding on-line future, and offers the Court the opportunity to choose which road on the information superhighway we shall travel,

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established in the pleadings. The application of the CDA to bar ZERAN'S recovery undoubtedly has retrospective effect.

the Court should grant the Petition for a Writ of Certiorari and afford this case the full consideration of the Court.

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Respectfully submitted,

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